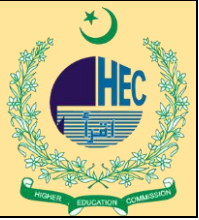




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Impacts of Parental Alienation on Minor and Non-Custodial Father; Promoting Equitable Shared Parenting in Pakistan

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ABSTRACT

This paper will navigate the custody laws for minors in Pakistan, as well as the hurdles faced by minors and non-custodian fathers. It further explores the concept of parental dispute over custody of children in Pakistan's legal system and argues that the status of male parents should be recognized as more than mere visitors in matters of guardianship and custody. While relying on the relevant case laws and legal provisions provided in national and cross border statutes, this article will highlight the importance of fathers in minor's lives and emphasises the need for a more significant approach to custody disputes. This article will also examine religious, cultural and social factors that may contribute to the marginalization of fathers in family law matters and suggests ways to promote greater gender equality and recognition of fathers' roles as caregivers and protectors of their children's well-being. Ultimately, the article will make a case for reforming Pakistan's family laws to better reflect the realities of contemporary family structures and relationships and also provide guidance on how to manage similar situations that may arise in the future.

Keywords: Custody of Child, Parental Alienation, Equitable Share, Family Laws in Pakistan, Gender Equality, marginalization of fathers.

Introduction

A child is like a bridge between the spouses, who receives love and affection from both parents and holds a special place in their hearts, making him / her the only prime reason which compels the spouses to live together, despite of their personal grudges. Consequently, neither parent wishes to lose their child under any circumstances. However, when the marriage of the couple breaks down, they may engage in attempts to undermine each other solely to fulfil their egos. In the midst of a battle for personal interests during divorce proceedings, the custody of children often becomes a major objective. Unfortunately, this has a significant impact on the minors who were born as a result of this marriage. The separation of the parents will eventually lead to the children suffering mentally and physically, which will serve as life lasting traumas. It is natural for children to love both of their parents and crave attention from them. However, the level of attachment with each parent may change significantly over time, depending on the child's age

and their mental capacity. Despite this, children always prefer to have the attention and love of parents, rather than just one. In most of the cases related to the custody of children, it has been observed that the parents after separation, use their minor child to hurt the emotions of each other by fighting over the custody of the minor and thereby drastically disregarding and ignoring the traumatic effect a child may have as a result of these acts.

Although the concepts of “Guardianship” and “Custody” are different. However, this study will be focusing on the concept of “Custody” which is “physical custody” of the minor only. Though, the concept of “Custody” itself is a very broad term and the courts deal with the same issue on case-to-case basis. Accordingly, the Courts will not just hand over the custody of the minor to one of the parents and deprive the other from their rights and responsibilities towards a minor, This is because the rights and the liabilities of the minors are distributed between both the parents and the Courts while deciding custody cases also consider other factors which attracts the needs of the minor which helps the Courts to reach at a just conclusion. In doing so, the Courts also look at the wishes of the minor and similarly if the minor is mature enough and desire to choose between the two, the Courts would take that into consideration too, however, the same process is questionable which will be discussed in detail. Moreover, it is also observed that some Courts most of the times allow the visitation rights of the minor child in the Courts’ premises to the non-custodian parent more frequently than the others by using their discretion. The same meeting in the Courts’ premises is held on the pretext that who will ensure the safety of the minor if removed from the Courts’ premises. However, in justifying the same, the Courts abandon the basic principle that how can a biologic parent would even think about hurting their own kin. Notwithstanding, the criminal procedure framework is designed to prevent such possibilities from occurring.

Laws in Pakistan Governing Custody Matters

One of the main laws dealing with the custody matters of the minor in Pakistan is the Guardians and Wards Act, 1890 (“GWA”). Section 3(g) of the GWA provides that the “minor” is a person who has not attained the age of majority within the meaning of the Majority Act 1875. The Majority Act 1875 provides the age of majority as being eighteen years. The Section 7 and Section 17 of the Guardian and Ward Act provides that the Courts should act in the welfare of the minor. Further, Section 7 empowers the Courts to declare a person to be the guardian of a minor of his/her person or property or both and only if it is in the “welfare of the minor.” However, in doing so, section 17 puts a mandatory requirement on the Courts to give regard to the age, sex and religion of the minor along with the character and capacity of the proposed guardian. Accordingly, the “welfare of the minor” plays a dominant factor over the others in custody matters.

The welfare of minor is pivotal aspect to be considered while handing over custody to any party. Since, the welfare is not defined in the Act then same is discussed by Superior Courts by time to time. Moreover, the Supreme Court of Pakistan in *Rahimullah Chaoudhury v. Sayeda Helali Begum* has stated that “welfare” is considered as question of fact and it must be resolved on the basis of the proofs available before the judge and not on the basis of presumptions.¹ Nonetheless, the Lahore High Court in *Sajid Rehmatullah v. Guardian Judge-II & Others* has provided that the word “welfare” is an comprehensive word, as it also includes material welfare,

¹ *Rahimullah Chaoudhury v. Sayeda Helali Begum* 1974 SCMR 305

in the sense of an adequate resources to be provided for a pleasant home and a comfortable living environment and while in the lens of adequate care purpose is to provide the sound health and due personal protection. Whereas, welfare also signifies the meaning as the security and stability, like the loving and understanding, guiding and caring, such methods of warm care and protection are important vital for the development of child and its character, personality and tents.² Moreover, the Supreme Court of AJ&K in *Waheeda Bashir Kiyani v. Muhammad Munsif Khan* has provided that the “welfare of minor” does not only include monetary expenses of the minor but also his/her mental and physical health, educational needs, psychological well-being, religious and moral values.³ Accordingly, the Courts while appointing a guardian/custodian, have to consider the fact that who (e.g. father or mother) is most mostly to foster the well-being of the child and so child can be in good position for its take care and protection and his/her interests.⁴ Similarly, Article 3 of the Convention on the Rights of Child “CRC” postulates that in dealing with the issues of the minor, judicial institutions, administrative authorities or legislative bodies, must take care for the best interests of the minor.

International Approaches to Guardianship Laws

The Courts in Canada by relying on the “best interests of child” used to preserve the status quo in custody matters⁵ as it seemed to be the easiest way to reach at the decision when both parents are equally competent. Accordingly, the Courts decided the custody matters on the basis whether custody in the hands of a competent father or mother should be continued further to maintain status quo. This status quo is used to refrain the change of environment, stability and position of the child even if the chances of better environment are offered by other party, along with ensuring and maintaining the connection with both parents as much as possible. Even when the change is required, the Courts allowed the change gradually through appropriate mechanisms by avoiding the disturbances in minor’s life.⁶ However, due to the various amendments in Divorce Act, 1985 of Canada there is a change of interpretation which will be discussed in this paper. The renown Professors Nicholas Bala and Patricia Hebert Q.C state that even if the change is required and that too gradually then a therapist should be appointed to assist the child in understanding that they do not have the power to refuse all the contact with any parent due to risk of long-term effects.⁷

Although, the Lahore High Court in *Mst. Safia Bibi v. Additional District Judge* has also stated that the Court would also look at the financial status of the person claiming as a proper guardian,⁸ accordingly, similar to the observation made by Islamabad High Court as above mentioned,⁹ nonetheless, the Supreme Court in *Riaz Ahmed v. Zahid Hussain Khan* has held that it is the duty of the father who is legally bound to maintain his child and therefore the poverty on part of the

² *Sajid Rehmatullah v. Guardian Judge-II & Others* PLD 2022 Lahore 183

³ *Waheeda Bashir Kiyani v. Muhammad Munsif Khan* 2022 YLR 2201 (Supreme Court (AJ& K)

⁴ *Khalid Mehmood v. Additional District Judge, Islamabad* 2011 CLC 889 (Islamabad)

⁵ *Benson v. Director of Child Welfare (Nfld)* [1982] 2 SCR 716 at 728 (Supreme Court of Canada)

⁶ Claire Bernard & Others, “Best Interests of the Child” Exposed: A Portrait of Quebec Custody and Protection Law” (1992) (Canadian Journal of Family Law) (11 Can. J. Fam. L. 57) 57-149 at 61

⁷ Prof. Nicholas Bala, Patricia Hebert Q.C, Children Resisting Contact: What’s a Lawyer to Do? (2016) (Canadian Family Law Quarterly) (Volume 36) (36 CFLQ 1) at p.12

⁸ *Mst. Safia Bibi v. Additional District Judge* 2022 CLC 762 (Lahore High Court)

⁹ *Khalid Mehmood v. Additional District Judge, Islamabad* 2011 CLC 889 (Islamabad)

mother would be no ground to dis entitle her from the custody of minor.¹⁰ Again the Supreme Court in *Mst. Beena v. Raja Muhammad & Another* held that in determining the welfare of the child and his custody, the physical condition (e.g. disability) or income of the mother are not determinant factors.¹¹ Additionally, the Supreme Court of India in *Nil Ratan Kundu and Another v. Abhijit Kundu*¹² has devised that the courts in exercising *parens patriae* jurisdiction are required to offer sufficient weight in child's ordinary comfort, development education, contentment, health, intellectual development and favourable surroundings. However, along with these, physical satisfaction, moral and ethical values must not be declined and objective in custody cases is the welfare and well-being of the child and not the rights of their parents.

Guiding Principle in Custody Precedents

Accordingly, along with the paramount factor of "welfare of minor", there are also a number of factors to which the Courts give regard when appointing a person as a guardian of the minor. The same may include the character, reputation, understanding, background, intellectual ability and norms of the proposed guardian as these all are directly or indirectly important factors in ensuring the healthy up-bringing of the minor and making him/her a useful and good citizen in a real sense.¹³ The Supreme Court of India in *Vishnu v. Jaya* has in deciding the cases of custody of the minor in favour of the mother or father, the Courts may not use "negative test" that he/she is "unfit" or disqualified from having the custody but it is the "positive test" as it would be in the best interests of the child to give the custody of him/her to father or mother.¹⁴

Factors Affecting Maternal Custody Rights of Minors

One of factor which was used by the courts to dis-entitle the mother over the custody of the minor was the marriage of the mother with a second husband if the same person is strange to the minor and within the prohibited degree.¹⁵ The same principle is recognized in the Sharia Law.¹⁶ However, a mother may claim the same rights back on the dissolution of her marriage due to death of her husband or divorce.¹⁷ Nonetheless, the same Para 354 of the Muhammadan Law as per the Superior Courts is not an absolute rule and the courts thus may depart from the same rule in exceptional circumstances when the Courts still find the welfare of the minor in favour of the mother. Similar was seen in the case of *Mst. Tahira Parveen v. District Judge Layyah* where the Lahore High Court stated that if a woman has separated from her first husband and is marrying second time to provide and secure the better and comfortable living of her infant child then she would not be deprived of her right of hizanat.¹⁸ The similar example was seen in the judgement of the Supreme Court of Pakistan in the case of *Raja Muhammad Owais v. Mst. Nazia Jabeen and Others* wherein the Supreme Court held that the second marriage of mother is not a

¹⁰ *Riaz Ahmed v. Zahid Hussain Khan* 2004 SCMR 821 see also *Munawar Bibi v. Muhammad Amin* 1995 SCMR 1206

¹¹ *Mst. Beena v. Raja Muhammad & Another* PLD 2020 SC 508

¹² *Nil Ratan Kundu and Another v. Abhijit Kundu* 2008 9 SCC 412

¹³ *Mst. Safia Bibi v. Additional District Judge* 2022 CLC 762 (Lahore High Court)

¹⁴ *Vishnu v. Jaya* AIR 2010 SC 2092

¹⁵ Para 354 Muhammadan Law

¹⁷ *Rafiqan v. Jalal Din* 1983 SCMR 481

¹⁸ *Mst. Tahira Parveen v. District Judge Layyah* 2022 MLD 1693 Lahore High Court

sole ground to dis entitle her of custody of the minors but Courts are required to look at the welfare of the minor in total.¹⁹

The religion of the minor is another key factor which the Court takes into account in determining the custody of the minor in favour of mother or father. Moreover, it is well-settled principle that the minors should be brought up according to the religion / sect of their father.²⁰ Likewise, the up-bringing of the minor in a non-Muslim foreign country may be considered against the Islamic culture and environment and thereby may play a factor in declining the custody of the minor in favour of mother or father. The Peshawar High Court in *Christine Brass v. Dr. Javed Iqbal* while giving the custody in favour of Pakistani Muslim father and against a Canadian Christian mother found the same custody in welfare of the minor,²¹ similar was deciding by the Sindh High Court wherein the custody was not given to the Jewish Indian mother.²² However, the contradictions persist in the decisions of the Courts in Pakistan due to the wide discretion in their power. This was seen in *Peggy Collin v. Muhammad Ishafque* where the Court while finding the custody in favour of French Non-Muslim mother and against French-Pakistani Muslim father stated that the religious and faith arguments adopted by father would not help him as he did not care about love, religion, residence and nationality of mother before his marriage.²³

Nonetheless, if the religion of both the parents is same then the courts would consider the resident country and religious environment for the minor. In *Habib-ur-Rehman v. Mst. Hina Saeed* Sindh High Court gave the custody in favour of a Pakistani Muslim mother against a French Muslim father on the account that the minors would be in a better upbringing as Muslim in Islamic Society of Pakistan.²⁴ However, the same custody on the basis of residence of minor in non-Islamic country may be disregarded on the basis of “welfare of minor” as seen in the case of *Tahira Zaib v. Ghaffar Ahmed* where Shairat Court of Azad Kashmir gave custody to the British National father on the basis that the minor would have prospectus of getting better education in UK and thus in the welfare of minor. Therefore, considering the contradictions, again it is argued that the presence of wide discretion in the hands of Courts to decide the cases of custody on the basis of “welfare of minor” has led to uncertainty. Thus, unless the harmony is brought by the legislatures in deciding the “welfare of minor” the same contradictions and uncertainty from the courts would continue. “A person is a person no matter how small.”²⁵ Accordingly, in consideration the “welfare of minor,” another major factor considered by the Courts is also the wishes of the minor “no matter how small but subject to sufficient maturity. The same factor is also recognized in the CRC 1989 which in Article 12(1) provides that the State Parties shall give due weight to the opinions of minor that affects the well being and care of child and the such weight should be in line with the with the age and maturity of the child. Additionally, Article 12(2) states that the States shall be obliged that child must be heard in judicial or administrative cases relevant to child matters, The Lahore High Court in *Mst. Ayesha Abdul Maleek v. Additional*

¹⁹ *Raja Muhammad Owais v. Mst. Nazia Jabeen and Others* Civil Petition No. 240 of 2021 (Supreme Court of Pakistan) Dated 05.10.2022

²⁰ *Imran Ali v. Mst. Iffat Siddiqui* PLD 2008 Karachi 198

²¹ *Miss Christine Brass v. Dr Javed Iqbal* PLD 1981 Peshawar 110

²² *Mrs. Mosselle Gubbay v. Khawaja Ahmad Said* PLD 1957 (W.P) Karachi 50

²³ *Peggy Collin v. Muhammad Ishfaq* Malik 2010 PLD 48 Lahore High Court

²⁴ *Habib-ur-Rehman v. Mst. Hina Saeed* 2010 MLD 544 Karachi High Court

²⁵ Dr. Seuss, *Horton Hears a Who!* (New York: Random House, 1954) at 6.

District Judge Sahiwal has ruled that decision of court could be made by looking at the intelligence preference of the minor.²⁶

Linking a Child's Preferences to Subsection (3) Of Section 17 Of The Guardian And Wards Act, 1890

Although when considering the wishes of the minor, the Courts have recognized that the child can be influenced by older people to make a particular choice.²⁷ Accordingly, the choice of the minor will be considered only if it is in the "welfare of the minor." Moreover, the Lahore High Court in *Ehangir Siraj Dogar v. District Judge and Another* has also stated that it is a general trend that a child is out to prefer to continue living with the parent with whom he/she has been allowed to live for some time as the same person either, be it father or the mother, would be at a better position to brain wash the child against the other.²⁸ Again, it may be argued that the child is mature enough to "choose" or "reject" one parent, however, still they are not mature enough of knowing the impacts of such choices. Therefore, letting a child to "choose" and "reject" a parent in custody matters may cause serious and significant impacts on them for a long term, which may also be due to a parent's pressure, influence or manipulation.²⁹ Therefore, this choice of "rejection" or "throwing away" one of the parents may not only convey a poor message to child that their significant connections are "disposable" but may also result in conflicts for child in future with the favoured parent and feelings for the rejected one by realizing that they have been "played" or "betrayed."³⁰ One may argue that if the child has grown up and has realized his/her mistake then he/she may always go back to the rejected parent, however, it is not necessary that the child or rejected parent would be able to maintain the same relationship due to continuous distance and ultimately ending up in feeling of no parent for the child. This same distance and "betrayal" due to divorce of parents and "choice" given to child is likely to end in higher school dropout rates, mental health issues, single parenthood, less satisfaction in life and ultimately issues in their own relationships with spouse in adulthood.³¹

Equality Before Law

The Article 25 of the Constitution of Islamic Republic of Pakistan provides that all citizens are equal before the law and thus entitled to same equal protection subject to Article 25(3), however, due to the wide discretion available to the courts in custody matters the same indirect discrimination with fathers continues. It is observed in the custody cases that when fathers leave their house to earn bread and butter for their home, leaving behind the minor to their parents, siblings or step-mother, are not likely to get the custody. The reason provided is that who would take care of the child behind his back.³² Nonetheless, the mother in the same scenario, who is

²⁶ Mst. Ayesha Abdul Maleek v. Additional District Judge Sahiwal 2020 YLR 401

²⁷ Mst. Tahira Parveen vs District Judge, Layyah and others 2022 MLD 1693 (Lahore (Multan Bench))

²⁸ Ehangir Siraj Dogar v. District Judge and Another 2021 YLR 1299 (Lahore High Court)

²⁹ Judy Cashmore & Patrick Parkinson, "Children's and Parents' Perception On Children's Participation in Decision Making After Parental Separation and Divorce (2008) (Family Court Review 46) 91-104

³⁰ Prof. Nicholas Bala, Patricia Hebert Q.C, Children Resisting Contact: What's a Lawyer to Do? (2016) (Canadian Family Law Quarterly) (Volume 36) (36 CFLQ 1) at p.6

³¹ Amy J.L Baker, *Adult Children of Parental Alienation Syndrome: Breaking the Ties that Bind* (2007) (New York: W.W. Norton & Company)

³² *Masroor Hussain v. Additional District Judge, Islamabad* 2011 CLC 851 Islamabad; *Asif Ali v. Mst. Tehmina Naseem Shad* 2008 PLD 132 Karachi High Court, Sindh; *Shahnaz Parveen v. Asadullah* 2001 PCRLJ 575 Karachi High Court,

living in a separate house and is doing a job, gets a positive factor in her favour for custody. The reason provided by the Courts is that if the mother is earning and is financially strong then she is independent, strong, intelligent and capable of fulfilling her child's need.³³ Although it is submitted that others factors are being considered by the courts while granting the custody to women, however, at the same time Courts asking "who would take care of the minor in absence of fathers" is not reasonable when the same question is not put in the custody cases to women who do the job. Therefore, the violation of equal rights and protection is also arguable in custody cases as the courts while using their wide discretion and umbrella of "welfare of minor" do go some extra mile in favour of mothers.

Shariah Law Dealing with Child's Custody Matters

Traditionally, under Shariah law, father is considered to be the natural guardian of his children and mother does not have any right over the children except provided in Para 252 of the Muhammadan Law which entitles the custody (Hizanat) in favour of the mother of her male child until the minor attains the age of 7 years and for the female child until minor attains puberty.³⁴ Similarly, at common law legal authority over of the minor was historically vested in the father regardless of the child's welfare.³⁵ Nonetheless, the concept of "wishes of the minor" is recognized by Shariah as it was also made the basis for decision by the Prophet Muhammad (PBUH) when a women came and asked "O Messenger of Allah my husband wishes to go away with my son" and the Prophet Muhammad (PBUH) said to the boy "This is your father and this is your mother. Take the hand of either of them whom you like" and the boy caught the hand of his mother and she went away with him."³⁶ Although as discussed above, father is a natural guardian under Sharia law and the mother is deemed as dis-entitled to the custody of the minor if she remarries with a stranger, however, regardless of the Sharia Law the Courts has to satisfy, whether the welfare of the minor lies with the father or mother when appointing him/her as a guardian of person. Therefore, rule of Muhammadan Law is not an absolute rule as per the Superior Courts and thus it is also subject to the "welfare of the minor."³⁷

Uncertainty and Consequences

In absence of proper guidelines by the legislative body the Guardian & Ward Courts are trying to save the minor child from venom of one parent against the other. Due to these circumstances, the father being the natural guardian is impliedly declared as a "Visitor" by the Guardian & Ward Courts, as father mostly gets only four to six hours a month to just see the face of his child. However, it is questionable that how a minor can create a bond with his other parent when he/she only gets to spend 4-6 hours a month? Isn't that against the welfare of child to deprive him/her from the love and company of his/her father?. Therefore, the same process does not

Sindh, *Abdul Qadir v. Babi Sabira* 2013 CLC 1749 High Court Balochistan (Quetta), *Yaqoob Ahmed v. Mst. Shaista* 2008 CLC 654 Karachi High Court (Sindh)

³³ *Mst. Muhammad Jan v. District Judge, Attock* 2010 MLD 42 Lahore High Court, *Shahnaz Parveen v. Asadullah* 2001 PCRLJ 575 Karachi High Court, Sindh, *Raja Muhammad Owais v. Mst. Nazia Jabeen and Others* Civil Petition No. 240 of 2021 Dated 05.10.2022 (Supreme Court of Pakistan < https://www.supremecourt.gov.pk/downloads_judgements/c.p. 240_2021.pdf >

³⁴ *Waheeda Bashir Kiyani vs Muhammad Munsif Khan* 2022 YLR 2201 (Supreme Court (AJ& K)

³⁵ Gillian Douglas and N V Lowe, *Becoming a Parent* in English Law (1992) (Law Quarterly Review) (L Q R 1992, 108(Jul)) 4140432 At 414

³⁶ *Mst. Tahira Parveen vs District Judge, Layyah and others* 2022 MLD 1693 (Lahore (Multan Bench))

³⁷ *Waheeda Bashir Kiyani vs Muhammad Munsif Khan* 2022 YLR 2201 (Supreme Court (AJ& K)

only hurt the feelings of most of the fathers by declaring them “Visitor” but also generates huge gap in creating a bond with their minor child with their father, to whom once he kissed on the forehead with eyes filled with joyful tears when he/she was born.

Accordingly, it is argued that the grievances of fathers related to custody and access to their minor continues. This grievance is raising due to trend of awarding sole custody to mothers in majority of the cases and further indirectly labeling fathers as mere “Visitors”. Additionally, it is observed that the courts only allow the access / visitation rights to the fathers on the payment of traveling charges to his wife.³⁸ It is therefore submitted that the time is not far away when the spouses in order to claim the custody of the minors or proper visitation rights, would be assassinating the character of each other in front of the open court.³⁹ The same example was seen in the breakdown of the Christian Marriage in United Kingdom and Pakistan when it was needed for the husband to accuse his wife of adultery, however, the same was changed to avoid the unnecessary character assassination.⁴⁰ Although it is also recognized in custody cases that mere allegation of bad character is not sufficient,⁴¹ however, finding no alternative remedy, fathers may not be stopped from pointing false allegations and thereby collecting each single factor against the custody in favour of mothers, or by expressing their views through illegal means. Similar incident was seen in May of 2004 when British Prime Minister Toney Blair was hit with a balloon filled with purpose dyed flour during his parliamentary debate by the fathers’ rights group “Fathers 4 Justice” to raise their concern over unfair custody rights.⁴² Accordingly, finding no alternative remedy and continuous justice various moments gave birth to fathers’ movements. The earliest of these movements was in 1970s in England having name as Families Need Fathers and then Fathers 5 Justice in 2003. Similarly, “men’s movement” in US, Lone Fathers Association in Australia in 1970s and Fathers For Justice movement in Canada in 1980s. It is also observed that when Guardian and Ward Courts exercise powers provided under section 100 of Cr.P.C for requiring the production of custody of minor, it causes a sense of insecurity and fear among minors, when he/she sees Police at their home. However, the legislatures have failed to realize that the use of section 100 Cr.P.C by the parties in custody matters may have drastic effects on the welfare of the minor. Accordingly, if the police officers visit the house of the custodian parent, the minor along with that parent would be brought in the court in a company of the police officers. This episode of involving police officers and no prior knowledge to the minor, would leave a negative impression in the mind of the minor which may equally be misused by both the parents to develop hatred in the heart of the minor against the other parent. Therefore, in order to avoid this episode and possible hatred, there should be alternative methods before resorting to remedy available in section 100 Cr.P.C. The legislatures and the Courts may put heavy costs on the party who does not comply with the orders, award

³⁸ Vanessa Amyot, “Batman’s Battle of Ideas: The Fathers’ Rights Movement in Canada” (2010) (Canadian Family Law Quarterly) (Volume 29) (29 CFLQ 31) at p.5

³⁹ Miranda Kaye and Julia Tolmie, “Fathers’ Rights Group in Australia and their Engagement with Issues in Family Law” (1998) 12 (Australian Journal of Family Law 19 (“Fathers’ Rights Group”) at 53-55

⁴⁰ See Section 7 and 10 of Christian Divorce Act 1869

⁴¹ *Muhammad Afzal v. Parveen Bibi* 2017 MLD 1116 Shariat Court Azad Kashmir; *Muhammad Yar v. Kaniz Fatima* 1995 PLD 91 Lahore High Court; *Munawar Bibi v. Muhammad Amin* 1995 SCMR 1206

⁴² BBC News Channel “Blair hit during Commons Protect” (Wednesday, 19 May, 2004) < news.bbc.co.uk/1/hi/uk_politics/3728617.stm >

compensatory parenting time, seek sureties, and ultimately resorting to section 100 Cr.P.C and contempt of court, if necessary, but all subject to unreasonable excuses or wilful non-compliance by the custodian parent. In doing so, the legislatures and the Court must also note that the child in their teen age may not obey their parents in compliance of the courts' orders, however, the huge responsibility should be on the custodian parent to satisfy the court that he/she did not only direct the minor to attend the meeting but took all the necessary steps to ensure the compliance as seen in *Godard v Godard*.⁴³ Moreover, the Courts must also observe this behaviour of the parents during the case and record the same in their orders and even put even an obligations on the custodian parent to encourage the minor to have contact with the non-custodian parent. The same should be continued even after the decision of custody for the possible change of the custody of the minor, if required.

While giving the final orders by the Guardian and Ward Courts, the Courts should also provide a detailed parenting plan order / schedule. Most of the Courts in Pakistan allow the visitation rights to parents; however, the schedule or detailed plan of parenting is not provided to parties. Therefore, the detailed schedule of the meetings is the need of time as discussed above. Accordingly, the Guardian and Ward Courts must ensure that the final order also gives the non-custodian parent more than the "visitation rights," and that the minor is well informed of the same rights by the Court (not by a single parent). The suggestive schedule for a non-custodian parent could be by allowing him/her the custody of the minor on weekends, public-holidays, school meetings, vacations, religious and social events. Nonetheless, the same suggestive schedule must not be absolute and could be allowed to change on the application to the court. The Court in these circumstances then would be required to ensure that it is within the true "welfare of the minor" by considering long-term effects.

Parental Alienation of a Child And Concept of Shared Parenting

The sole obligation of Guardian and Ward Court is to ensure the welfare of the minor child, if a minor child is allowed to spend his/her whole life with one parent and few weeks or months with other in this way the principle of welfare of minor is affected. It is clearly suggested through research that the separation of parents poses risk to children, however, the same risk may be minimized if child is allowed to continue relationship with both of parents.⁴⁴ The Guardian and Ward Courts in most of the cases assume that the welfare of the child lies with the mother until proven otherwise. However, the courts often fail to consider the negative effects on the child's relationship with their father if they are kept away from him for such a significant period. A child loses bonding with his father and he might develop hatred for his father. Besides, the issue of brainwashing or long-term consequences on the child is not adequately addressed in most of guardianship courts. If a child is denied access to their father during their formative years, it is possible that their memories of their father could be erased. This problem of influence and brain wash can simply be dealt with through referring a minor to a neutral psychiatrist. The Psychiatrist then shall be required to record and the access maturity and wishes of a minor impartially on various days by maintaining confidentiality (custody assessments). Additionally, by recording

⁴³ *Godard v. Godard* 2015 ONCA 568 (CanLII) (Court of Appeal) (Ontario, Canada)

⁴⁴ Finley, G.E. and Schwartz, The Divided World of the Child: divorce and long-term psychosocial adjustment" (2010) Family Court Review) 48: 515-527

multiple interviews of a child “privately” in judge’s chamber as seen in Canada,⁴⁵ but subject to the proper training of the presiding officers / judges and avoiding influence and maintaining confidentiality. The same influence of father or mother on the minor can be avoided by ensuring that the minor is brought in the Court through a neutral party.⁴⁶ Examples of avoiding influence is seen Canada where judges sometimes accompany a minor to a fast-food restaurant for a chat,⁴⁷ or in Ohio, USA where Justice McColley sometimes conducts the interview of minors in prepared playrooms, play games, draw pictures or colour with them.⁴⁸ With this process, the reports of psychiatrists and judges can encourage the parents to reach at the settlement by upholding the minors wishes. Psychologist Dr. Barbara-Jo Filder of Toronto, Canada has even suggested a non-exhaustive list of “warning signs” for minors in custody cases which may assists the judiciary in confirming the wishes and reasons of the minor in custody cases, if the resources of appointing psychiatrists are lacking.⁴⁹ Therefore, to avoid parental influence on the minors wishes in Pakistan the legislatures and the Courts needs to come up with appropriate legislative provisions and guidelines. Although it could be argued that these assessments and engagement of the judges with the minors can be costly considering to lack of resources of parents, courts and government. Nonetheless, considering the minors’ welfare, mental health, well-being and long term affects the argument of lack of resources is not justified. It is seen in most of the child custody matters one parent displays negativity of other parent to the minor in order to create hatred against him/her, the sole purpose of this is to damage the relationship of child with other parent. In this way, the custodian parent teaches the child how to hate and uses the parental alienation as tool. In the race of egoism the one who suffer the most is the child. Consequently, the child becomes victim of parental alienation which causes devastating impacts on the child’s life. In such circumstances, the child loses respect for his/her non-custodian parent and sometimes goes into the state of anxiety.

As discussed above, regardless of the custody in favour of the mother or the father, the burden of loss lands on the shoulders of the child. It is also found that children suffer more when raised without the presence of their father after the separation of their parents and that when children who are only raised under the custody of their mother get less development and more social problems and in their childhood which then results in poverty, inexperience behaviour, and involvement in immoral and criminal activities.⁵⁰ The idea of shared parenting ensures that both parents have equal opportunities and rights to participate in their child's upbringing. It's important to distinguish between shared legal custody and shared physical custody. With shared legal custody, both parents have an equal say in making major decisions for the child's upbringing. In contrast, with shared physical custody, both parents take equal responsibility for

⁴⁵ Ontario's Children's Law Reform Act, RSO 1990 c C-12, s 64

⁴⁶ Carolyn Savoury, A Voice for “The Small”: Judicial “Meetings” in Custody and Access Disputes (Canadian Journal of Family Law) (2012-13) 28 Can. J. Fam. L. 225

⁴⁷ Bala & Birnbaum, “Hearing the Voice of Children”

⁴⁸ Justice DJ McColley, “Receiving Evidence From Children: Interviewing Children” (Paper delivered at the Family Law - The Voice of the Child Conference, 5 March 2009)

⁴⁹ Psychologist Dr. Barbara-Jo Filder “Behaviour & Warning Signs” < <https://menandfamilies.org/wp-content/uploads/2020/02/Behaviour-Warning-Signs-Exhibited-by-Child-Alienating-Parent-and-Rejected-Parent.pdf> >

⁵⁰ Susan Boyd, “Robbed of their Families”? Fathers’ Rights Discourses in Canadian Parenting Law Reform Process” at 31-32

the child's care and spend an equal amount of time with the child. However, the exact division of time may not always be 50/50, but the child spends a significant number of overnight stays with each parent.⁵¹ This concept of shared parenting has emerged and has been adopted by various jurisdictions. The same concept is also due to the fact that raising a child alone is one of the hardest works and thus could be exhausting. Accordingly, this concept allows both the parents to share the burden, rights, duties and obligations of the minor and thus reduces the pressure on parents where both the parents enjoy the equal custody over the child and the same goes to the child who enjoys the shadow, love, affection and blessings of both the parents. This same concept provides healthy life and environment to the child as the child needs the shadow of both the parents during his life at certain stages.

Since the endowment of of Family Law Act 1975 in Australia, certain amendments has been inserted for the purpose of balanced approach towards the shared parenting. According to Section 60B of the Act, children must benefit from both parents' meaningful involvement in their lives in order for their best interests to be served. This ensures that children are receiving appropriate and sufficient parenting to help them reach their full potential. Children have the right to know and receive care from either or both of their parents, even if they are not together; they also have the right to frequently spend time with and interact with both of their parents as well as other important individuals in their care, welfare, and development (such as grandparents and other family members); and parents participate in joint parenting by sharing duties and responsibilities related to their children's upbringing. Additionally, section 60C of the Act mandates that "the benefit of the child having meaningful relationship with both the child's parents" be the major factor for the courts when evaluating what is in the child's best interests.⁵² In United Kingdom, Children and Families Act 2014, section 11 provides that unless contrary is shown, the presumption of involvement of both the parents in child's life is that it will further the child's welfare. Accordingly, it provides equal status to both the parents with presumption unless contrary is shown. Nonetheless, the same section provides that "involvement" does not necessarily mean particular division of a child's time but it can be either direct or indirect.⁵³ Moreover, the concept of shared physical custody has increased in United States with time. The data has shown that likelihood of having a shared custody in divorce cases has doubled nationally with the passage of time and that it is also one of the countries with the highest rate of shared physical custody after the divorce.⁵⁴ Similarly, one of the Wisconsin, a US state statute also provides that "The court may not prefer one potential custodian over the other on the basis of the sex or race of the custodian." Accordingly, the courts will not give favour to the mother or father on the basis of their gender or race, but instead it will focus on the best interests of the child.⁵⁵

⁵¹ Maria Cancian & Others, Who Gets Custody Now? Dramatic Changes in Children's Living Arrangements After Divorce" (May 2014) (Demography) (Vol.51(4)) pp.1381-1396 at 1382

⁵² Section 60B & 60CC of Family Law Act 1975 (Australia)

⁵³ Robin Charrot, Changes in the family law system: can you keep up? (2015) (Private Client Business) (PCB 2014, 3) 125-131 at 127

⁵⁴ Daniel R. Meyer & Others, Increases in shared custody after divorce in United States (June 2022) (Demographic Research) (Volume 46, Article 38) pp.1137-1162 at 1154

⁵⁵ Maria Cancian & Others, Who Gets Custody Now? Dramatic Changes in Children's Living Arrangements After Divorce" (May 2014) (Demography) (Vol.51(4)) pp.1381-1396 at 1382

The Canadian Divorce Act 1985, section 16(6)⁵⁶ provides that the Courts, in allocating parenting time, shall give effect to principle that a child should have as much as time with each spouse as is consistent with the best interests of the child. Nonetheless, in *Young v Young* (1993), the Court has provided that the goal of maximum contact is not absolute and therefore the access may be restricted when there is evidence to prove that such contact would conflict with the best interests of the child.⁵⁷ Although the Courts in Canada have focused on the quality of the custody time instead of quantity e.g. 50/50 and to maintain status quo, however, the same Courts have also made orders for joint custody and equal parenting orders even for the children who were aged 5, 7, and 9 years old, despite serious allegations by both the parents on each other.⁵⁸ Nonetheless, the same concept of shared parenting is not found in the Guardian & Ward Court in our Country. As discussed, it is quite possible that the minor would resist one parent and would want to go with the other, regardless of his/her welfare.

Conclusion

In conclusion, Pakistan's legal system has traditionally viewed fathers as secondary caregivers and visitors in matters of guardianship and custody. However, this narrow approach fails to recognize the important roles that fathers play in their children's lives as providers, protectors, and caregivers. As society develops and parental responsibilities continue to shift, it's need of time that Pakistan's family laws afford fathers the recognition and rights they deserve concerning the custody of minors. The gender-inclusive approach will take into account and will ensure the welfare of minors in matters related to their custody. By adopting a more holistic view of fatherhood and minimizing the gender gap, Pakistan's legal system can better serve the needs of families and their children, in such a way a better and equitable society can be promoted. In the case of separation of spouses, they are the children who suffer the most. Being separated from one parent causes the child to undergo stress and physical and mental trauma, which causes profound emotional and psychological harm to the child. Unfortunately, the psychological impact on the minor is often overlooked and not properly addressed. In order to ensure the healthy development of a child's emotional bonds, particularly between fathers and sons, the Guardian & Ward Courts while deciding the custody of minor, must consider the option of share parentage as one of the key component for welfare of child. Mostly, the Guardian & Ward Courts grant custody of a child to the mother without assessing the true welfare of the child irrespective of any gender priority. As a result, fathers are often left with limited visitation rights, causing them to lose out. Preferably, to address and resolve such issues lawmakers must legislate on shared parenting, which will not only bring gender equality but also broaden the concept of the welfare of minors. The children will become the ultimate beneficiary of the inclusion of the provision of shared parenting in 'The Guardian and Wards Act, 1899' besides elimination of father's label a mere "Visitor" it will also add more value in the children's lives by providing them love, affection and bond of both parents. In addition, it's necessary that the courts while deciding the custody of children must recognize the status of the father and his significance in a child's

⁵⁶ Divorce Act 1985 < <https://laws-lois.justice.gc.ca/eng/acts/d-3.4/page-3.html#h-173218> >

⁵⁷ *Young v. Young* 1993 CarswellBC 264, 1993 CarswellBC 1269, [1993] 4 S.C.R. 3 (S.C.C) at para. 212

⁵⁸ Ilana Arje-Goldenthal, Equal Parenting Time in Ontario: Exploring Legislative, Judicial and Social Science Attitudes to the Issue (2018) (Canadian Family Law Quarterly) (Vol.37) (37 CFLQ 189) p.14 & 15 see also *Bargiel v. Mainville* 2013 ONSC 5899, 2013 CarswellOnt 13794 (Ont. S.C.J), *Somerville v. Olynyk* 2012 ONSC 2101, 2012 CarswellOnt 4143 (Ont. S.C.J)

well-being. The law does not provide a presumption of the welfare of the child in favor of any of the parents, the burden of proving the welfare of the child lies on both father and mother, which will ultimately be decided by the Court by assessing and appreciating the evidence on the record.

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